IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 71 of 2007
With
SECOND APPEAL No. 123 of 2007

For Approval and Signature:

HONOURABLE MS. JUSTICE R.M.DOSHIT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DEVJIBHAI.D.KAPURIA - Appellant(s)
Versus
DAMJIBHAI BHAVANBHAI & 4 - Respondent(s)

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Appearance :
MR MB RANA for Appellant(s) : 1,
MS SONAL D VYAS for Respondent(s) : 1,
None for Respondent(s) : 2 - 5.

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CORAM : HONOURABLE MS. JUSTICE R.M.DOSHIT

Date : 24/08/2007

COMMON ORAL JUDGMENT

Heard the learned advocates. With the consent of the learned advocates, the Appeals are heard and decided today.

These two Appeals arise from the judgment and order dated 5th March, 2007 passed by the learned Additional Sessions Judge and Fast Track Court, Jamnagar in Regular Civil Appeal No.172/2005.

The appellant in Second Appeal No.71/2007 instituted Special Civil Suit No.93/1996 in the Court of Civil Judge (S.D.), Jamnagar for partition and recovery of possession of his share in the suit properties.

The defendant and the appellants in the above Second Appeal No.123/2007 are the father and the brothers of the plaintiff. According to the plaintiff, the suit properties were the ancestral properties in the hands of his father, the defendant no.1, and he he had equal share along with his father and the brothers. The suit was contested by the defendants by written statement (Exh.7). According to the defendants, the suit properties were the self acquired properties of the defendant no.1. The plaintiff had been given a piece of residential land

when he separated from the family. The suit for partition was, therefore, not maintainable. The learned Civil Judge, by judgment and order dated 25th August, 1998, dismissed the suit and passed decree against the plaintiff. According to the learned Civil Judge, the suit properties were the self acquired properties of the defendant and that the plaintiff had no share in the suit properties.

Feeling aggrieved, the plaintiff preferred First Appeal No.47/1999 before this Court. In view of the Gujarat Civil Courts Act, 2005, the suit being of the value of less than Rs.5 lakhs, the appeal came to be transferred to the District Court and numbered as Regular Civil Appeal No.172/2005. The lower appellate Court dismissed the appeal by impugned judgment and order dated 5th March, 2007. The lower appellate Court held that the defendants had failed to prove that the suit properties were the self acquired properties of the defendant no.1 as alleged and that the preponderance of the probability required that the suit properties were the joint family properties and that the plaintiff was a co-parcener. The plaintiff

had, therefore, equal share in the suit properties with his father and the brothers. The lower appellate Court, however, dismissed the appeal on the ground that the plaintiff had failed to implead his sisters, the daughters of the defendant no.1. In absence of the sisters the suit was bad for non-joinder of necessary parties.

Feeling aggrieved by the dismissal of the appeal, the plaintiff has preferred the above Second Appeal No.71/2007. Feeling aggrieved by the findings of fact recorded by the lower appellate Court, the defendants have preferred the above Second Appeal No.123/2007.

I am of the opinion that the impugned judgment and order of the lower appellate Court deserves to be quashed and set-aside. The lower appellate Court has failed to decide the appeal before it as a first appeal ought to be. The lower appellate Court has failed to frame the points for determination as is required by Order 41 Rule 31 CPC. Though, in first appeal the whole matter is at large before the first

appellate Court, the lower appellate Court has failed to consider and decide the matters at issue in light of the pleadings and evidence on record. The finding of fact has been recorded on the basis of presumption rather than evidence on record.

For the aforesaid reasons, both these Appeals are allowed. The impugned judgment and order dated 5th March, 2007 passed by the learned Additional Sessions Judge and Fast Track Court, Jamnagar in Regular Civil Appeal No.172/2005 is quashed and set-aside. The Appeals are remanded to the lower appellate Court for hearing and decision afresh. The lower appellate Court shall hear and decide the appeal before it after framing points for determination and in accordance with law. The parties will bear their own cost.

Records and proceedings be returned to the lower appellate Court forthwith. The registry will maintain copy of this order in each Appeal.

Learned advocate Ms.Vyas appearing for the defendants states that the defendants are cultivating

the lands in question and they do not intend to dispose of the lands in any manner.

(Ms. R.M.Doshit, J.)

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